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No.

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ROBERT A. HAVERSAT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals erroneously held that the test for determining if a factor is sufficiently unusual or extraordinary to permit a downward departure under §5K2.0 of the Sentencing Guidelines is to conduct a limited review of only those cases involving the same offense, rather than comparing all other cases in which the same factor appears, regardless of the offense, as other circuits have held.

2. Whether the court of appeals erroneously held, contrary to other circuits, that a defendant's extraordinarily good character and extraordinary civic and charitable work do not provide grounds for downward departure under §5K2.0 of the Sentencing Guidelines as a matter of law unless the defendant struggled in a difficult environment or otherwise overcame some significant hardship.

3. Whether the court of appeals erroneously held, contrary to other circuits, that a defendant's substantial assistance to the administration of justice does not provide grounds for a downward departure as a matter of law under §5K2.0 of the Sentencing Guidelines.

PARTIES TO THE PROCEEDING

The parties to the second appeal to the Court of Appeals for the Eighth Circuit were defendant Robert A. Haversat and the United States of America. The parties to the first appeal to the Eighth Circuit were defendants Robert A. Haversat and David B. Gibson, and the United States of America. The parties to the original proceeding before the district court were the United States of America and defendants The Stanley Works, the Hager Hinge Company, McKinney Products Co., Lawrence Brothers, Inc., Richard G. Martin, John F. Hollfelder, Robert A. Haversat, David B. Gibson and John A. Lawrence.

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ROBERT A. HAVERSAT,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The defendant Robert A. Haversat petitions for a writ of certiorari to review the decisions of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The first opinion of the court of appeals (App. A, infra) is reported at 22 F.3d 790. The second opinion of the court of appeals (App. B, infra) is unreported, but the decision is noted in the table reported at 53 F.3d 335.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit on the first appeal was entered on April 22, 1994. (App. A, infra). The judgment of the Eighth Circuit on the second appeal was entered on May 2, 1995. (App. B, infra). On May 8, 1995, the Eighth Circuit granted Mr. Haversat's motion for an extension of time of fourteen days to file a petition for rehearing with suggestion for rehearing en banc. (App. C, infra). The Eighth Circuit denied Mr. Haversat's petition for rehearing with suggestion for rehearing en banc on the second appeal on July 6, 1995, noting that Judge Beam would grant the suggestion for rehearing en banc. (App. E, infra). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULES INVOLVED

This case involves 18 U.S.C. §3553(b) (App. F, infra), and §§3E1.1, 5K1.1 and 5K2.0 of the Federal Sentencing Guidelines (Apps. G-I, infra).

STATEMENT OF THE CASE

This case arises from Mr. Haversat's plea of nolo contendere to a one-count indictment charging him with price-fixing in violation of the Sherman Antitrust Act, 15 U.S.C. §1. The district court had jurisdiction under 18 U.S.C. §3231 and 15 U.S.C. §1. At sentencing, the district court granted a downward departure under §5K2.0 of the Federal Sentencing Guidelines based on Mr. Haversat's extraordinarily good character, as shown by the fact that, for the past twenty years, Mr. Haversat has devoted nine weeks per year to charitable and community activity. The district court also based the departure on Mr. Haversat's substantial assistance to the judicial system by entering an early plea along with others in a multidefendant case and by facilitating the settlement of several related, complex, civil antitrust suits, saving years of judicial resources.

The Government appealed, basing jurisdiction on 28 U.S.C. §1291 and 18 U.S.C. §3742(b). On appeal, the Eighth Circuit reversed on the grounds that Mr. Haversat's charitable activity, while laudable, did not distinguish him from other antitrust offenders, and on the further grounds that Mr. Haversat had failed to show that he struggled in a difficult environment or otherwise overcame some significant hurdle. In addition, the Eighth Circuit held that assistance to the courts does not provide grounds for downward departure under §5K2.0 but should be considered under the acceptance of responsibility guideline, §3E1.1, instead. The Eighth Circuit also affirmed the district court's denial of credit for acceptance of responsibility.

On remand for resentencing, the district court held that it lacked the power to revisit the acceptance of responsibility guideline to consider Mr. Haversat's assistance to the courts. The district court concluded that it was required to sentence Mr. Haversat within the guideline range of Level 11, without further adjustments or departures, despite the fact that it had not previously considered assistance to the courts under §3E1.1 but had granted a five-level departure based on that same evidence. As a result, Mr. Haversat was sentenced at Level 11 to four months of imprisonment and four months of home confinement. On Mr. Haversat's appeal under 28 U.S.C. §1291 and 18 U.S.C. §3742(a), the Eighth Circuit affirmed the district court's decision under the law of the case doctrine.[1] Mr.

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[1] The law of the case doctrine does not limit this Court's review of the issues to be raised on certiorari, because a petition for certiorari brings the entire case up for review. See, e.g., Lujan v. National Wildlife Federation, 497 U.S. 871, 882 n.1 (1990) ("the earlier panel's ruling does not, of course, bind this Court"); Christianson v. Colt Indus. Operating Corp., 486 U.S. 800 (1988) ("a court of appeals' adherence to the law of the case cannot insulate an issue from this Court's review"); Pennsylvania v. Ritchie, 480 U.S. 39, 49 n.7 (1987) ("Law-of-the-case principles are not a bar to this Court's jurisdiction"); Reece v. Georgia, 350 U.S. 85, 87 (1955) (rejecting argument that the Supreme Court could not consider a prior decision in the case because the losing party had failed to file a petition for certiorari at

Haversat is the only defendant in the case to receive a prison sentence, even though he was not the leader or organizer of the antitrust conspiracy.

REASONS FOR GRANTING THE PETITION

I.

THE CIRCUITS ARE DIVIDED AS TO THE STANDARD FOR DETERMINING WHETHER A DOWNWARD DEPARTURE IS PERMISSIBLE UNDER §5K2.0 OF THE SENTENCING GUIDELINES

This Court should grant Mr. Haversat's petition for a writ of certiorari to resolve a conflict in the circuits as to the appropriate test for determining whether a downward departure is permissible under §5K2.0 of the Federal Sentencing Guidelines. The appropriate standard for granting a downward departure merits this Court's attention because it is an important and recurring issue under the Sentencing Guidelines.

Under §5K2.0, the district court may grant a downward departure based on a factor not considered by the Sentencing Commission in formulating the guidelines, or based on a factor present to a degree not considered by the

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that time).

Sentencing Commission. U.S.S.G. §5K2.0 (App. I, infra). Applying the second part of this equation, the First Circuit has held that the district court should conduct a broad comparison of all other cases involving the same factor asserted as grounds for departure, regardless of the offense of conviction, to determine whether the factor in the defendant's case is sufficiently unusual or extraordinary to permit a departure. The Ninth Circuit has suggested its agreement with the approach of the First Circuit. Conversely, the Fourth, Fifth, Sixth and Eighth Circuits have held that the district court should determine whether a factor is present to an unusual or extraordinary degree by conducting a limited comparison of cases involving the same offense only. This Court should resolve this conflict in the circuits in order to further the interests of uniformity in sentencing, which is the purpose of the Sentencing Guidelines. Ortega-Rodriguez v. United States, 113 S. Ct. 1199, 1208 (1993) (the Sentencing Reform Act of 1984 and the Sentencing Guidelines were intended to eliminate disparity in sentencing); Mistretta v. United States, 488 U.S. 361, 365-67 (1989) (same).

A. The First and Ninth Circuits Compare All Cases Involving the Same Factor Asserted as Grounds for Departure

In this case, the district court granted a downward departure on the basis of Mr. Haversat's extraordinarily

good character. (C.A. App. 31).[2] In particular, the evidence showed that, for twenty years, Mr. Haversat has devoted an average of nine working weeks per year to charitable and community projects. (C.A. App. (first appeal) at 124). On appeal, the Eighth Circuit acknowledged that Mr. Haversat's activities were "considerable" and "laudable," but found that they were not sufficiently "extraordinary" because they did not "make him an atypical defendant in antitrust price-fixing cases." United States v. Haversat, 22 F.3d 790, 796 (8th Cir. 1994) (emphasis in original). The court of appeals explained its reversal of the downward departure as follows: "[H]igh-level business executives, those who are in a position to commit Sherman Act violations, also enjoy sufficient income

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[2] Section 5H1.11 provides that "civic, charitable, or public service, . . . and similar prior good works are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." U.S.S.G. §5H1.11, p.s. Therefore, charitable activity, while not ordinarily a basis for departure, is a basis for departure if the nature and extent of the defendant's activity is unusual or extraordinary. United States v. DeMasi, 40 F.3d 1306, 1324 (1st Cir. 1994), cert. denied sub nom. Bonasia v. United States, 115 S. Ct. 947 (1995). Section 5H1.11 was not promulgated until November 1, 1991, after the date of Mr. Haversat's offense, but is viewed as a clarifying amendment. Id. at 1324 n.19.

and community status so that they have the opportunities to engage in charitable and benevolent activities." Id.

By relying on the amount of Mr. Haversat's income, the court of appeals overlooked the fact that what was extraordinary about Mr. Haversat's community activities was his commitment of substantial time to them; money was not a factor at all. But more significantly, the court of appeals unduly restricted its analysis by comparing Mr. Haversat's charitable activities to those of defendants who had also been convicted of price-fixing, rather than reviewing all other cases in which a defendant had asserted his or her charitable activities as a basis for departure.

The Eighth Circuit's decision in this case is in direct conflict with the subsequent decision of the First Circuit in United States v. DeMasi, 40 F.3d 1306, 1324 (1st Cir. 1994), cert. denied sub nom. Bonasia v. United States, 115 S. Ct. 947 (1995). In DeMasi, the First Circuit reversed the district court's downward departure based on a bank robber's charitable work and community service. The district court had found that the defendant's activities were atypical compared to "the typical bank robber." The First Circuit criticized this approach because the district court did not compare the defendant to other defendants "from other cases who similarly had commendable community service records." Id.. Instead, the district court stated: "If this was a securities fraud case or bank fraud case, probably the downward departure would not be appropriate." Id. The First Circuit held that the district court had "erred by restricting the scope of its comparison to only bank robbery cases." As a result, the First Circuit remanded for the

district court to "survey those cases where [community service] is present, without limiting its inquiry to cases involving the same offense, and only then ask whether the defendant's record stands out from the crowd." Id.

The First Circuit in DeMasi acknowledged as contrary authority, with a "but cf." cite, the Eighth Circuit's opinion in this case, United States v. Haversat, 22 F.3d 790, 795-96 (8th Cir. 1994), with a parenthetical stating, "reversing departure because defendant's charitable and volunteer activities were not atypical for a defendant in an antitrust price-fixing case." Rejecting the Haversat decision, the First Circuit relied instead on United States v. Jackson, 30 F.3d 199, 202-03 (1st Cir. 1994), in which the First Circuit reversed a downward departure based on age after comparing the defendant's age to all other cases in which the defendant had asserted age as a basis for downward departure, regardless of the underlying offense.[3]

In addition, the DeMasi court relied on United States v. Rivera, 994 F.2d 942, 953-54 (1st Cir. 1993) (Breyer, C.J.), in which the First Circuit reversed the district court's decision that it lacked the authority to grant a downward departure based on extraordinary family circumstances.[4] Writing for the First Circuit, then Chief Judge Breyer

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[3] Age is "not ordinarily relevant" to sentencing. U.S.S.G. §5H1.1, p.s.

[4] Family ties are ordinarily not relevant to sentencing. U.S.S.G. 5H1.6, p.s.

reviewed a variety of cases in which the defendant had asserted extraordinary family circumstances as a basis for downward departure. In some of those cases, the court permitted departure "in similar, or even less sympathetic circumstances," and in other cases, the court forbid departure in "circumstances less compelling" than those before the court in Rivera. Id. at 954. Significantly, the First Circuit in Rivera made no reference to the underlying offense in any of the cases used as a point of comparison, thereby suggesting that the district court was not required to restrict its analysis to cases involving the same offense as the one before the district court.

The Ninth Circuit has also suggested agreement with the First Circuit's analysis of the significance of charitable activity. In United States v. Takai, 941 F.2d 738, 744 (9th Cir. 1991), the Ninth Circuit held that it was permissible for the district court to consider the defendant's "acts of benevolence" in deciding whether his criminal conduct was a single aberrant act and therefore merited a downward departure. The court of appeals stated as follows:

> The government conceded at oral argument that if Mother Teresa were accused of illegally attempting to buy a green card for one of her sisters, it would be proper for a court to consider her saintly deeds in mitigation of her sentence. A gangster, on the other hand, should not be able to get credit for his or her calculated charities. Where a defendant has a blameless record, his

> or her outstanding generosity should be taken into account.

Id. The Ninth Circuit did not suggest that a white-collar offender should be compared only to other white-collar offenders in deciding whether a downward departure is permissible. Instead, the court of appeals focused on the character of the putative individual defendant, suggesting that Mother Teresa's charitable activity is more genuine than the charitable activity of a gangster and would therefore be more likely to provide grounds for a downward departure.

B. The Third, Fifth, Sixth and Eighth Circuits Compare Only Cases Involving the Same Offense

The Eighth Circuit's approach is consistent with that of the Sixth Circuit, which compares the defendant only to similar defendants who committed similar offenses. United States v. Kohlbach, 38 F.3d 832, 838 (6th Cir. 1994). In Kohlbach, the Sixth Circuit reversed the district court's downward departure based on the community ties, civic and charitable deeds, and prior good works of a defendant who had pleaded guilty to adulterating orange juice, 21 U.S.C. §341. The Sixth Circuit compared the defendant to other "high-ranking corporate executives" who had committed "similar white-collar cases," and concluded as follows:

> [I]t is usual and ordinary, in the prosecution of similar white-collar crimes involving high-ranking corporate executives such as [the defendant], to find that a defendant was

> involved as a leader in community charities, civic organizations, and church efforts.

Id. (emphasis in original).[5] The Sixth Circuit's approach was slightly broader than that of the Eighth Circuit, in that the Sixth Circuit considered cases involving similar offenses rather than only cases involving exactly the same offense. However, the Sixth Circuit's analysis was still unduly narrow, because it failed to consider all cases in which the defendant had asserted charitable work as a basis for downward departure.

In reaching its decision, the Sixth Circuit relied in part on United States v. McHan, 920 F.2d 244, 248 (4th Cir. 1990), in which the Fourth Circuit reversed a downward departure based on the charitable donations of a defendant convicted of narcotics offenses. The McHan court suggested that the defendant should be compared only to other defendants who had committed narcotics offenses, and stated that it would be "ironic if the judicial system were to reward McHan with a lower sentence because he was a successful

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[5] The district court in United States v. Scheiner, 873 F. Supp. 927, 935 (E.D. Pa.), aff'd w.o. op., 1995 U.S. App. LEXIS 17911 (3d Cir. June 29, 1995), cited both Haversat, 22 F.3d 790, and Kohlbach, 38 F.3d 832, as grounds for denying the defendant's motion for leave to appeal to the Third Circuit from the district court's denial of a downward departure based on civic and charitable contributions, finding that the defendant's position had been "clearly rejected by the approaches taken in the Sixth and Eighth Circuits . . . ."

drug dealer rather than an unsuccessful one." McHan is distinguishable from this case because the defendant in McHan donated money rather than committing substantial time to charitable activities,[6] but the Fourth Circuit in McHan and the Eighth Circuit in this case took the same narrow approach of comparing the defendant only to others who have committed the same or similar offenses.

The Fifth Circuit has also taken a narrow approach to determining whether the downward departure under §5K2.0 is permissible. In United States v. O'Brien, 18 F.3d 301, 303 (5th Cir.), cert. denied, 115 S. Ct. 199 (1994), the Fifth Circuit reversed a downward departure based on the good character and post-conviction charitable activity of a musician convicted of conspiracy and possession with intent to distribute marijuana plants. The defendant had provided musical performances worldwide, organized benefit shows for social service and charitable organizations, and worked in a music program in the local public schools. However, the Fifth Circuit reversed the departure on the grounds that the defendant could not show that he used his musical skills differently from other "professionals subject to sentencing." The court of appeals stated:

> [The defendant] has talent and the respect of many people, but so do many professionals

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[6] As the McHan court noted, socio-economic status is "not relevant" to sentencing, and therefore can never provide grounds for departure. U.S.S.G. §5H1.10, ps. McHan, 920 F.2d at 248.

> who come before the courts for sentencing. We see no way to take [this] case out of the "heartland" without drawing subtle distinctions between the way [the defendant] used his musical skills and the way other professionals subject to sentencing have employed their talents.

Id. (emphasis added). The Fifth Circuit did not compare the defendant to other drug offenders, but struck down the departure based on a comparison of other professional musicians.

II.

THE CIRCUITS ARE DIVIDED ON THE STANDARD FOR GRANTING A DOWNWARD DEPARTURE UNDER §5K2.0 OF THE SENTENCING GUIDELINES FOR GOOD CHARACTER AND CIVIC AND CHARITABLE WORK

This Court should grant Mr. Haversat's petition for a writ of certiorari to clarify the standard to be applied in determining whether the district court may grant a downward departure based on the defendant's extraordinarily good character and extraordinary civic and charitable work. Only the Eighth Circuit requires the defendant to show that he or she struggled in a difficult environment or otherwise overcame some significant hardship in order to qualify for a

downward departure based on good character and civic and charitable work.

In this case, the Eighth Circuit reversed the district court's downward departure based on Mr. Haversat's extraordinarily good character and his civic and charitable work on the express grounds that Mr. Haversat did not show that he had "struggled in a difficult environment" or "otherwise overcame some significant hardship . . . ." United States v. Haversat, 22 F.3d 790, 795 (8th Cir. 1994). In its opinion, the court of appeals distinguished United States v. Big Crow, 898 F.2d 1326, 1330-32 (8th Cir. 1990), in which the Eighth Circuit affirmed a downward departure based on the defendant's "excellent employment history, solid community ties, and consistent efforts to lead a decent life in a difficult environment" on a Native-American reservation. See also United States v. One Star, Sr., 9 F.3d 60 (8th Cir. 1993) (affirming downward departure based on work record and contributions to community; citing Big Crow as authority for departing based on "the unusual mitigating circumstances of life on an Indian reservation"). The only distinction between Mr. Haversat's case and the two prior cases, Big Crow and One Star, is that the latter two cases involved Native-American defendants who had overcome the difficulties of life on a reservation.[7]

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[7] See United States v. Vue, 865 F. Supp. 1353, 1359 n.7 (D. Neb. 1994) ("In all candor, I must confess that these 'Indian reservation' cases trouble me for a variety of reasons not pertinent to resolution of this case.").

No other circuit has imposed the condition that the defendant prove that he struggled or overcame difficulties in order to qualify for a downward departure based on character and civic and charitable work. See, e.g., United States v. DeMasi, 40 F.3d 1306, 1324 (1st Cir. 1994), cert. denied sub nom. Bonasia v. United States, 115 S. Ct. 947 (1995); United States v. Kohlbach, 38 F.3d 832, 838 (6th Cir. 1994); United States v. McHan, 920 F.2d 244, 248 (4th Cir. 1990). The Eighth Circuit's unique decision is without support in the Sentencing Guidelines and is inconsistent with this Court's admonition that the "court of appeals' traditional deference to a district court's exercise of its sentencing discretion" survived the passage of the Sentencing Guidelines. Williams v. United States, 503 U.S. 193, 112 S. Ct. 1112, 1121 (1992). Consistent with Williams, this Court should grant Mr. Haversat's petition for a writ of certiorari to resolve the conflict in the circuits as to whether a defendant's extraordinarily good character and civic and charitable acts provide a basis for downward departure under §5K2.0 in the absence of a showing that the defendant struggled in a difficult environment or otherwise overcame some significant obstacle.

III.

THE CIRCUITS ARE DIVIDED AS TO WHETHER A DEFENDANT'S ASSISTANCE TO THE COURTS PROVIDES GROUNDS FOR DOWNWARD DEPARTURE UNDER §5K2.0 OF THE SENTENCING GUIDELINES

This Court should grant Mr. Haversat's petition for a writ of certiorari to decide whether a defendant's substantial assistance to the administration of justice provides a legal ground for downward departure under §5K2.0. In Wade v. United States, 504 U.S. 181 (1992), this Court held that the district court may not grant a downward departure for substantial assistance to the prosecution under §5K1.1 absent a motion by the government, but may review the government's failure to make such a motion based on an unconstitutional reason such as race or gender. However, in Wade, this Court did not address whether the district court may grant a downward departure under §5K2.0 based on the defendant's substantial assistance to the courts, rather than the prosecution.

The courts of appeals are divided on the question of whether assistance to the courts, rather than the prosecution, provides grounds for a downward departure under §5K2.0. The Eighth and Ninth Circuits have held that assistance to the courts does not provide grounds for departure under §5K2.0. But the Second Circuit has held to the contrary, and the Sixth Circuit has indicated its agreement with the Second Circuit. The Eleventh Circuit has suggested a

disinclination to permit such a departure, but appears to have left the question open. This Court should grant Mr. Haversat's petition for a writ of certiorari to resolve this conflict in the circuits and answer the question left unresolved by this Court in Wade.

A. The Eighth and Ninth Circuits Do Not Permit Departure Based on Assistance to the Courts

In this case, the Eighth Circuit reversed the district court's decision to grant a downward departure based on Mr. Haversat's substantial assistance to the courts, finding that §5K2.0 does not permit such a departure. United States v. Haversat, 22 F.3d 790, 794-95 (8th Cir. 1994). The court held that Mr. Haversat's early plea of nolo contendere in a multidefendant case, and his assistance in settling numerous complex, civil antitrust suits, did not provide grounds for downward departure. Instead, the court of appeals stated, those facts should be considered under the acceptance of responsibility guideline, §3E1.1.[8]

[8] Having held that evidence concerning assistance to the courts should be considered as part of the calculus of the acceptance of responsibility guideline, the court of appeals should have remanded for reconsideration of that guideline. The district court did not grant credit to Mr. Haversat for acceptance of responsibility because it did not consider his assistance to the courts as part of that guideline.

As further support for its decision, the Eighth Circuit concluded that "substantial assistance to the administration of justice is also counted, to some degree, under U.S.S.G. §5K1.1," which governs the defendant's substantial assistance to the prosecution. As to this issue, the Eighth Circuit cited with approval the Ninth Circuit's decision in United States v. Shrewsberry, 980 F.2d 1296, 1298 (9th Cir. 1992), cert. denied, 114 S. Ct. 120 (1993), in which the court stated: "It is difficult to imagine any material assistance to the prosecution that does not aid the courts in the administration of justice."

The Eleventh Circuit appears to have left open the question of whether the defendant's assistance to the judicial system provides grounds for downward departure. In United States v. Lockyer, 966 F.2d 1390, 1392 (11th Cir. 1992), the Eleventh Circuit affirmed the district court's refusal to grant a downward departure based on assistance to the courts. The court of appeals agreed that as a factual matter the defendant had failed to show that his conduct, waiving indictment and pleading guilty at his first appearance in a single defendant case, amounted to anything more than acceptance of responsibility under §3E1.1. The Eleventh

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Considering that the district court granted a five-level downward departure based in part on Mr. Haversat's assistance to the courts, there can be no doubt that it would have granted the two-point credit to Mr. Haversat for acceptance of responsibility had it considered Mr. Haversat's assistance to the courts under that guideline.

Circuit reserved the question of whether assistance to the courts could ever provide grounds for a departure.

B. The Second and Sixth Circuits Have Recognized Assistance to the Courts as a Grounds for Departure

The Eighth Circuit's decision in this case and the Ninth Circuit's decision in Shrewsberry that assistance to the courts is not a basis for departure under §5K2.0 is in conflict with the Second Circuit's decision in United States v. Garcia, 926 F.2d 125, 127-28 (2d Cir. 1991). The Eighth and Ninth Circuits have expressly declined to follow Garcia. Haversat, 22 F.3d at 794-95; Shrewsberry, 980 F.2d at 1298. The Eleventh Circuit has not decided whether to follow Garcia. Lockyer, 966 F.2d at 1392. In Garcia, the Second Circuit affirmed a downward departure based on the district court's finding that the defendant's conduct "broke the log jam" in a multidefendant case, and that his relatively early guilty plea and willingness to testify against his co-defendants induced them to enter guilty pleas.

In its decision, the Second Circuit reasoned that §5K1.1 does not preclude a downward departure based on assistance to the courts because §5K1.1 concerns assistance to the prosecution only, and not assistance to the courts. The Second Circuit acknowledged that the defendant's willingness to testify against his co-defendants assisted the prosecution, but emphasized that the defendant had also "conserved judicial resources by facilitating the disposition of the case without a trial." Garcia, 926 F.2d at 128. As a

result, the defendant's "activities facilitating the proper administration of justice in the District Court" provided a basis for downward departure. Garcia, 926 F.2d at 128. Moreover, the Second Circuit stated that the acceptance of responsibility guideline, §3E1.1, did not preclude a departure, because a defendant's willingness to testify "is more than mere acceptance of responsibility." Id.

The Sixth Circuit, relying on Garcia, has recognized assistance to the courts as a basis for departure under §5K2.0. In United States v. DeMonte, 1992 U.S. App. LEXIS 11392 (6th Cir. May 12, 1992) (unreported decision), the Sixth Circuit stated: "A defendant who has cooperated with the government but does not meet the 5K1.1 departure criteria may qualify, under Section 5K2.0, for departure based on mitigating circumstances of a kind or to a degree not adequately considered by the Sentencing Commission." On a second appeal after remand, the Sixth Circuit affirmed the district court's departure based on the defendant's "extraordinary level of cooperation," but reversed the departure based on restitution. United States v. DeMonte, 25 F.3d 343 (6th Cir. 1994). That decision generated three opinions: one for the majority, and two others concurring in part and dissenting in part. Judge Batchelder wrote separately because he would have reversed the downward departure based on extraordinary cooperation. And Senior Judge Celebrezze wrote separately because he would have affirmed the downward departure based on restitution.

DeMonte is a case study in the division of the circuits concerning the proper application of §5K2.0 of the Sentencing Guidelines. Because of the conflict in the circuits as to whether assistance to the courts provides a basis for departure under §5K2.0, this Court should grant Mr. Haversat's petition for a writ of certiorari as to this issue.

CONCLUSION

This Court should provide guidance to the courts of appeals and the district courts as to the appropriate standard to be applied under the downward departure provision of the Federal Sentencing Guidelines. To permit the continued division of the courts of appeals on this important federal question would undermine the purpose of the Sentencing Reform Act and the Federal Sentencing Guidelines, which is to promote uniformity in sentencing. Section 5K2.0 is perhaps the single most important provision of the Sentencing Guidelines because it enables the district court to

depart from the Guidelines in unusual cases to ensure that justice is done. For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES of America,
Appellant/Cross-Appellee,

v.

Robert A. HAVERSAT, Appellee/Cross-Appellant.

UNITED STATES of America,
Appellant/Cross-Appellee,

v.

David B. GIBSON, Appellee/Cross-Appellant.

Nos. 93-2090, 93-2203, 93-2091 and 93-2201.

United States Court of Appeals,
Eighth Circuit

Submitted Nov. 11, 1993.

Decided April 22, 1994.

John J. Powers, Washington, DC, argued (Joseph H. Widmar, John J. Powers, III and Marion L. Jetton, P. Terry Lubeck, Robert W. Wilder, Sanford M. Adler and Gregory E. Neppl, appear on the brief), for appellant/cross-appellee U.S.

Paul R. Grand of New York City, argued (Paul R. Grand, Diana D. Parker and Alan P. Williamson, appear on the brief), for appellee/cross-appellant Haversat.

Larry H. Krantz of New York City, argued (Jeffrey C. Slade and Larry H. Krantz, appear on the brief), for appellee/cross-appellant Gibson.

Before BOWMAN, Circuit Judge, JOHN R. GIBSON,* Senior Circuit Judge, and HANSEN, Circuit Judge.

HANSEN, Circuit Judge.

Robert A. Haversat and David B. Gibson each pleaded nolo contendere to a single count of conspiring to fix prices in violation of section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. The district court departed downward at sentencing and sentenced Haversat and Gibson each to pay a $250,000 fine. The government appeals the sentences. Haversat and Gibson cross appeal the district court's findings denying them an acceptance of responsibility adjustment and determining the volume of commerce affected by the price-fixing scheme. We affirm the district court's findings on acceptance of responsibility and the volume of commerce affected, but we reverse the district court's downward departures, vacate the sentences imposed, and remand for resentencing.

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* The Honorable John R. Gibson was an active judge of this court at the time this case was submitted and took senior status on January 1, 1994.

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I.

From 1977 to 1986, Robert A. Haversat served as president of McKinney Products Company (McKinney). In May of 1986, Haversat represented McKinney at two secret meetings with McKinney competitors in the architectural hinge industry to discuss and implement a price-fixing scheme designed to boost the price of and profits from architectural hinges sold in the United States. Representatives of McKinney, The Stanley Works (Stanley), the Hager Hinge Company (Hager), and Lawrence Brothers (Lawrence Bros.), attended the meeting and joined the price-fixing scheme. These four firms controlled the vast majority of the architectural hinge market in the United States at the time of the meetings.

The vice president of sales for Stanley at that time, John Hollfelder, organized the first meeting and made the first proposal for a price-fixing scheme. Hollfelder proposed a 20 to 35 percent reduction in the published price for the hinges accompanied by a reduction of and limitation on the discounts given to customers. Some manufacturers had offered discounts previously as high as 70 percent and the proposal was to reduce the discounts to no more than 40 percent. At the second meeting, the representatives of each company again discussed the scheme. Haversat stated that David B. Gibson, then McKinney's marketing manager, was aware of the scheme. The parties decided that they would implement the scheme and Stanley would publish a new price book with the agreed-on price and the other competitors would follow with similar price books.

In September of 1986, David Gibson took over as president of McKinney. Gibson attended two more meetings, in February and August of 1987, to discuss the progress of the price-fixing scheme. The price-fixing

conspiracy continued well into 1988. Each of the participating companies made millions of dollars during the operation of the conspiracy.

The conspiracy came to the attention of the United States Department of Justice Antitrust Division, which initiated an investigation. The investigation resulted in a one-count indictment being filed May 22, 1990, charging Haversat and Gibson, as well as three other individuals and four corporations (including McKinney), with conspiring to fix prices in violation of 15 U.S.C. § 1.

Haversat and Gibson pleaded nolo contendere to the charges on August 20, 1992. They were sentenced March 31-April 1, 1993. Both defendants had a base-offense level of 9 under U.S.S.G. § 2R1.1(a) (Oct. 1987).[1] The district court added a two-level increase, to level 11, after finding pursuant to U.S.S.G. § 2R1.1(b)(2) that the volume of commerce affected by the conspiracy exceeded $15 million. The district court also found that neither defendant was entitled to an acceptance of responsibility reduction under U.S.S.G. § 3E1.1.

The district court, however, pursuant to U.S.S.G. § 5K2.0, departed below the Guideline range for both Haversat and Gibson and sentenced them both at the equivalent of an offense level 6. The district court did not impose any incarceration or probation upon either defendant and imposed a fine of $250,000 on each of them. Without the downward departure, these defendants would have been sentenced at an offense level of 11 and faced 8 to 14 months

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[1] There is no dispute that the district court used the 1987 version of the Sentencing Guidelines Manual in imposing the sentence. Under the 1987 Guidelines, the base-offense level was 9. In 1989, the base-offense level was raised to 10.

of imprisonment and a fine of $800,000 to $2,000,000. *See* U.S.S.G. § 2R1.1(c) (1987). The government appeals the sentences of both Haversat and Gibson, arguing that the downward departures were not warranted in this case. Haversat and Gibson cross appeal, arguing that they were entitled to acceptance of responsibility and that the district court erred in calculating the volume of commerce involved.

II.

"The only circumstance in which the district court can disregard the mechanical dictates of the Guidelines is when it finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission.'" *Burns v. United States*, 501 U.S. 129, 131-35, 111 S.Ct. 2182, 2184-85, 115 L.Ed.2d 123 (1991) (quoting 18 U.S.C. § 3553(b)). The Guidelines explicitly provide for the "departures" authorized by 18 U.S.C. § 3553(b) in U.S.S.G. § 5K2.0. We use a three-step test to determine if the departure is appropriate under § 3553(b):

> First, as a question of law, we determine 'whether the circumstances the district court relied on for departure are sufficiently unusual in kind or degree to warrant departure.' ... Second, as a question of fact, we determine 'whether the circumstances justifying departure actually exist.' ... Finally, with deference to the district court, we review the reasonableness of the degree of departure under an abuse of discretion standard.

United States v. Sweet, 985 F.2d 443, 445 (8th Cir. 1993) (quoting *United States v. Lara-Banda*, 972 F.2d 958, 960

(8th Cir. 1992)); *see also Williams v. United States*, ___ U.S. ____-____, 112 S.Ct. 1112, 1120-21, 117 L.Ed.2d 341 (1992) (under 18 U.S.C. § 3742(f) court of appeals must remand for resentencing "if the sentence was imposed as a result of an incorrect application of the Guidelines or if the sentence is an unreasonable departure from the applicable guideline range.").

III.

A. *Departure in Haversat's Sentencing*

The district court referred to the following factors in support of its decision to depart downward in Haversat's case:[2] Haversat's assistance to the court; his good character and exemplary life; the coercive economic influence of Stanley; and the fact that he was a relative newcomer who "swam with the crowd" and lacked the courage to object to the scheme. The government contends that none of the factors enumerated by the district court support the departure. Haversat argues on appeal that two of those

[2] The district court stated its reasons for departing downward on the record at the sentencing hearing and in the final judgment entered against the two defendants. There is some variance in the reasons provided on the record and in the written judgment for each defendant. Haversat argues that where there is a variance between the statement of reasons, the statements at the sentencing hearing prevail and the reviewing court should disregard the reasons in the written record. We look to both the written record and the hearing record if the reasons provided are not irreconcilable. Here, the reasons given are not irreconcilable. The written reasons appear to simply supplement the oral ruling.

factors support the departure: his substantial assistance to the courts and his exceptional character.[3]

(1) *Assistance to the Court*

The district court found that a downward departure was appropriate because Haversat's actions assisted the court in administering justice and saving court resources. (Defs.' Jt.App. at 190-91.) Haversat contends his nolo plea and his assistance in settling the related civil antitrust lawsuit are the particular acts that assisted the court. The government argues that these acts are not, as a matter of law, a basis for downward departure under section 5K2.0. Haversat argues that this assistance to the courts presents a sufficient basis for the departure. *See United States v. Garcia*, 926 F.2d 125, 127-28 (2d Cir.1991) (defendant's substantial assistance to the courts is grounds for departure).

We have never authorized a downward departure on the basis of a defendant's assistance to the courts.[4] We

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[3] Haversat also argues that the government waived some of its objections to the departure. While he is correct that the law requires the government to specifically object to the downward departure, we find that the government has done so in this case.

[4] Haversat argues that we previously noted our approval of 5K2.0 departures on the basis of assistance to the courts in *United States v. Kelley*, 956 F.2d 748 (8th Cir. 1991) (en banc). We disagree. In *Kelley*, we only noted the existence of cases embracing the theory, but then specifically found that the question was not presented in Kelley's case. *Kelley*, 956 F.2d at 752 n. 5. We did not endorse departures under U.S.S.G. § 5K2.0 based on assistance to the courts. Haversat also relies on Judge Beam's dissent in *Kelley*, which contends that a departure is available on

have held, however, that district courts lack the authority to depart downward under U.S.S.G. § 5K2.0 on the basis that the defendant's early guilty plea conserved judicial resources. *United States v. Garlich*, 951 F.2d 161 (8th Cir. 1991). A guilty plea before trial is a factor to be considered only in the acceptance of responsibility determination under U.S.S.G. § 3E1.1. *Id.* at 163-64.[5]

The reasoning of *Garlich* applies with equal force in this case. Haversat's argument that his early nolo plea should be basis for downward departure because it assisted the court is virtually identical to Garlich's argument that downward departure was appropriate because his early guilty plea saved judicial resources. The nolo plea then is a factor to be considered (if at all) only in the determination of acceptance of responsibility. Similarly, Haversat's assistance in settling a related civil lawsuit is also more properly treated as a factor to be considered in relation to acceptance of responsibility. Helping to settle a related civil suit is somewhat similar to providing "voluntary assistance to

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a *Garcia*-type theory without a government motion. *Id.* at 757-59 (Beam, J., dissenting). That view, however, did not garner a majority and consequently is not the law of this circuit.

[5] We specifically noted in *Garlich* that the defendant's attempt to rely on *Garcia* was misplaced. 951 F.2d at 164. We also note that U.S.S.G. § 3E1.1 was amended in 1992 to authorize an additional level of departure for offenses at level 16 or greater for early notification of a defendant's intention to plead guilty "permitting the court to allocate its resources efficiently." The provision by the Sentencing Commission for rewarding assistance to the courts in the efficient allocation of its resources as part of an acceptance of responsibility adjustment reinforces our view that the subject is to be treated there and not as a departure topic.

authorities in the recovery of the fruits and instrumentalities of the offense," which is an appropriate consideration for determining acceptance of responsibility. U.S.S.G. § 3E1.1, comment. (n. 1(e)).

Moreover, substantial assistance to the administration of justice is also counted, to some degree, under U.S.S.G. § 5K1.1, which allows a sentencing court to depart downward "[u]pon motion of the government stating that the defendant has provided substantial assistance" to the prosecution. "It is difficult to imagine any material assistance to the prosecution that does not aid the courts in the administration of justice. Nor can assistance to the courts fail to aid the prosecution in some measure." *United States v. Shrewsberry*, 980 F.2d 1296, 1298 (9th Cir. 1992) (specifically declining to follow *Garcia*).

We conclude that a defendant's early nolo plea and a defendant's assistance in settling a related civil suit do not provide a basis for downward departure under section 5K2.0. The district court erred in relying on these factors in imposing Haversat's sentence.

(2) *Good Character*

The district court also found Haversat's good character supported a downward departure under section 5K2.0. (Defs.' Jt. App. at 191; Appellant's App. at 8.) Haversat argues that his outstanding charitable and community service work exhibited his exceptional character to the district court and supported the departure. Haversat contends that we have authorized downward departures under § 5K2.0 on the basis of a defendant's good character. *United States v. David Big Crow*, 898 F.2d 1326, 1330-32 (8th Cir.1990). We disagree.

We did not authorize a general "good character" departure in *Big Crow*. We simply found that the fact that Big Crow had consistently made efforts to overcome the extreme hardship of life on the reservation supported a departure. *Id.* at 1331-32. We have characterized the *Big Crow* analysis as inapplicable where the defendant failed to show that he "struggled in a difficult environment like the defendant in [*Big Crow*]." *Garlich*, 951 F.2d at 164. Subsequent cases also have observed that the departure authorized in *Big Crow* is limited to cases where a defendant overcame many substantial obstacles presented by the difficult life on the reservation. *See, e.g., United States v. Alex One Star*, 9 F.3d 60, 61 (8th Cir.1993) (*Big Crow* departure based on defendant's excellent employment record and other consistent efforts to overcome difficult conditions of reservation life). Given the fact that Haversat and the district court failed to point to any evidence in record to show how Haversat "struggled in a difficult environment" or otherwise overcame some significant hardship, the district court's downward departure was not authorized under *Big Crow*.

Charitable or volunteer activities conceivably can serve as the basis for downward departure but only where those activities are truly exceptional in nature. *See United States v. Neil*, 903 F.2d 564, 565-66 (8th Cir.1990: *see also* U.S.S.G. § 5H1.11, p.s. (Nov.1991) (civic, charitable, or public service, as well as employment related contributions and record of prior good works, "not ordinarily relevant in determining whether to depart under 5K2.0."). Departure on that basis is appropriate only where the "district court 'finds an atypical case, ... where [the] conduct [in question] significantly differs from the norm,'" *Neil*, 903 F.2d at 565 (quoting U.S.S.G. Ch. 1, Pt. A, 4(b) at 1.6 (Oct. 1987)). We conclude that Haversat's charitable and volunteer

activities, while considerable, do not make him an *atypical* defendant in antitrust price-fixing cases. A number of his codefendants, including Gibson, for example, have made identical arguments in support of downward departure based on equally worthy records of charitable and volunteer activity. It would appear that high-level business executives, those who are in a position to commit Sherman Act violations, also enjoy sufficient income and community status so that they have the opportunities to engage in charitable and benevolent activities. *See* U.S.S.G. § 5H1.10 (socio-economic status not relevant to determination of sentence). Haversat's activity, while laudible, is not extraordinary. Accordingly, we conclude that the district court's downward departure on the basis of Haversat's charitable activities and good character was not permissible because there has been no showing that "'the circumstances the district court relied on for departure are sufficiently unusual in kind or degree to warrant departure.'" *Sweet*, 985 F.2d at 445 (quoting *Lara-Banda*, 972 F.2d at 960); *see also United States v. Groene*, 998 F.2d 604, 607-08 (8th Cir.1993) (reversing as clear error district court's finding that circumstances demonstrated that defendant's community service was sufficiently extraordinary to justify downward departure).

(3) *Coercive Economic Influence of Stanley*

The district court also found that the coercive economic influence of Stanley on the other participants in the conspiracy, including Haversat, provided an additional reason to depart downward. Even assuming that such facts existed, this is not a sufficient basis for departure. The Guidelines explicitly state that "[t]he Commission considered the relevance of economic hardship and determined that personal financial difficulties and economic pressures upon

a trade or business do not warrant a decrease in sentence." U.S.S.G. § 5K2.12, p.s. Thus, the district court erred in relying on the economic coercion of Stanley as ground for departure.

(4) *Relative Newcomer Who Lacked Courage to Object*

The district court also noted that it departed downward because Haversat "was a relative newcomer to this level of industry and just 'swam with the crowd' without exercising the courage to object to the unlawful price fixing." (Appellant's Addend. at 8.) We need not determine whether this constitutes sufficient legal grounds for departure because there is simply no factual support for the district court's statements. It is undisputed that Haversat was not a newcomer to this level of industry as he had been the President of McKinney from 1977 to 1986 when the conspiracy began. Likewise, Haversat did not simply "swim with the crowd." He jumped into the pool willingly and was a participant from the very beginning of the scheme.

We find that none of the reasons provided by the district court support the downward departure in sentencing Haversat. Accordingly, we set aside his sentence and remand for resentencing pursuant to 18 U.S.C. § 3742(f)(1).

B. *Departure in Gibson's Sentencing*

The district court recited a number of grounds to support a downward departure in sentencing Gibson. Many of the reasons provided were identical to those recited in support of Haversat's departure. The district court found that downward departure was warranted for Gibson because: Gibson had led an exemplary life filled with numerous

charitable activities and contributions; Gibson assisted the court by entering a nolo plea that facilitated the disposition of the case; Gibson's participation in the crime was caused in part by the coercive economic influence of Stanley; and Gibson was of advancing age and his wife suffers serious health problems. The reasons we stated above for rejecting the first three of these grounds for departure in Haversat's case apply equally for Gibson's case. Thus, we find that the first three grounds do not support a downward departure for Gibson.

Gibson argues strenuously that his extraordinary family situation presents sufficient grounds for the district court's downward departure.[6] The district court stated in its final judgment that it was departing downward based, in part, on the fact that Gibson's wife had very severe mental health problems. (Appellant's Addend. at 4.) "Family ties and responsibilities ... are not ordinarily relevant in determining whether a sentence should be outside the guidelines." U.S.S.G. § 5H1.6, p.s. However, we have found that "[e]xtraordinary family circumstances, i.e., outside of the 'heartland' of cases the Guidelines were intended to cover, can be the basis for a downward departure." *United States v. Harrison*, 970 F.2d 444, 447 (8th Cir.1992) (internal quotations omitted); *see also Neil*, 903 F.2d at 565 (policy statement that factor is *ordinarily* not

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[6] The district court also noted Gibson's advancing age as a reason for departure. There is no dispute, however, that Gibson was only 50 at the time of sentencing. To the extent that the district court relied on this factor, it is not supported by the evidence in this case and should not be considered on remand. *See* U.S.S.G. § 5H1.1 (age not ordinarily relevant for departure).

relevant necessarily implies that the factor may be relevant in extraordinary cases).

We find that Gibson's truly exceptional family circumstances make this an appropriate case for downward departure. Mrs. Gibson has suffered severe psychiatric problems, which have been potentially life threatening. (Gibson's Present. Rpt. at 10.) Mr. Gibson has been actively involved in her care. (*Id.*) Dr. Slovak, Mrs. Gibson's treating physician, has characterized David Gibson's participation as an "irreplaceable" part of Dr. Slovak's treatment plan for Mrs. Gibson. (Defs.' Jt.App. at 227-28.) Dr. Slovak depends on Mr. Gibson to identify the beginning of any regressions and to seek out immediate treatment to avoid "a serious situation." (*Id.*) Dr. Slovak's opinion is that "Mrs. Gibson would not do well if separated from the aid of her spouse, and I [Dr. Slovak] would have grave clinical concerns that her medical management could be safely continued without the ongoing presence of her spouse, even if that separation was only a matter of several weeks." (*Id.*) The totality of these factors make this a permissible basis for departing downward on Gibson's sentence. *See United States v. Gaskill*, 991 F.2d 82, 85-86 (3d Cir. 1993) (finding circumstances merited a downward departure where, among other things, defendant's wife had 20-year history of mental illness and defendant provided care for her and his incarceration would jeopardize her well-being).

However, because the district court relied upon both permissible and impermissible factors in making its downward departure, Gibson's sentence is appropriate only if: (1) "the district court would have imposed the same sentence had it not relied upon the invalid factor or factors", and (2) the departure is reasonable. *Williams*, ___ U.S. at ____-____, 112 S.Ct. at 1120-21. There is really no dispute

that the district court would have imposed the same sentence even if it had not relied on the impermissible factors. We find, however, that the district court abused its discretion by granting an unreasonable departure in this case. *See Sweet*, 985 F.2d at 445 (reasonableness of the departure reviewed under abuse of discretion standard).

The district court departed downward the equivalent of five offense levels and then declined to impose confinement or even probation. The Sentencing Commission has emphasized that the sentencing court should impose some *confinement* in all but the rarest criminal antitrust cases. *See* U.S.S.G. § 2R1.1, comment. (backg'd.) (noting that "in very few cases will the guidelines not require that some confinement be imposed"). The Sentencing Commission also stated that it "believes that the most effective method to deter individuals from committing [antitrust] crime is through imposing short prison sentences coupled with large fines. This controlling consideration underlying this guideline is general deterrence." *Id.*

This is not the rarest of cases where confinement should be avoided altogether.[7] The district court described this antitrust conspiracy as "unusually long and harsh and well planned." (Tr. Gibson's Sent. at 195.) The Sentencing Guidelines provided the district court with the ability to craft a sentence that imposes some form of confinement to meet the expressed goal of U.S.S.G. § 2R1.1 and that still takes into consideration Gibson's need to be available to render care to his wife. *See* U.S.S.G. §§ 5B1.1(a)(1), 5B1.3(d),

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[7] This case differs from *Gaskill* where the court found that there was a "lack of any end to be served by imprisonment other than punishment." 991 F.2d at 86. Here, there is an important end to be served by imprisonment -- general deterrence.

5B1.4(b)(20), & 5F5.2 (1987). The failure to impose such a sentence and to depart all the way down to only a fine was unreasonable in this case. Hence, the only permissible reason for the departure, Gibson's exceptional family circumstances, does not "justify the magnitude of the departure," *Williams*, ___ U.S. at ____, 112 S.Ct. at 1121, and we set aside Gibson's sentence and remand for resentencing in accordance with the above text, *see* 18 U.S.C. § 3742(f)(2)(B).

IV.

We additionally must note that at both Haversat's and Gibson's sentencings, the district court repeatedly and outwardly displayed its disdain for the Sentencing Guidelines. The district court explicitly stated its disagreement with the level of punishment the Guidelines impose for "white collar crimes" like those committed in this case. (Defs.' Jt.App. at 183-85.) The district court went as far as to announce at Haversat's sentencing that "if I tried to apply the guidelines in their full bloom of -- of completeness, I would be making a mistake that would add to the injustice," (*Id.* at 188), and that "it would not be appropriate to use the guidelines in all their bean counting glory." (*Id.* at 189.)

We have serious concerns about the district court's comments and in particular its comments indicating a reluctance (or a refusal) to apply the Guidelines. The Guidelines are law and it is abundantly clear that the district court does not have the discretion or power to disregard particular Guidelines it does not like. *See United States v. Maul-Valverde*, 10 F.3d 544, 546 (8th Cir.1993) ("A court may not depart because it considers a Guideline misguided."); *United States v. Marshall*, 998 F.2d 634, 635

(8th Cir.1993) ("Disagreement with the Guidelines does not justify a departure."). The record provides great uncertainty about whether the district court carried out its duty to follow and apply the Guidelines in this case. This uncertainty is itself yet another reason to remand for resentencing. *See United States v. Ford*, 17 F.3d 1100, 1104 (8th Cir. 1994) (comments made by district court suggesting decision to grant downward departure may have been based on dissatisfaction with Guidelines requires remand for clarification or resentencing).

V.

Haversat and Gibson argue on cross appeal that if we reverse and remand for resentencing, then the district court should be allowed to reconsider awarding them acceptance of responsibility. They argue that while the district court indicated at sentencing that acceptance probably was not appropriate, it declined to actually rule on acceptance because it was departing downward. They misread the record. At Haversat's sentencing, for example, the district court stated:

> In the case yesterday, *I denied the acceptance of responsibility bonus to Mr. Gibson, and I do so in this case, too.* I don't think it is clear that this is the kind of case where there have been truly acceptance of responsibility considering the totality of the circumstances. [sic] But on the other hand, I think it is a moot question and almost a theoretical question because I have departed from the guidelines in each of these cases, and there is no question that I will depart from the guidelines in this matter also.

(Defs.' Jt.App. at 181.) (emphasis added). The record clearly indicates that the district court denied a reduction for acceptance of responsibility, but then stated that its ruling did not matter because it was departing downward. We deny the request of Haversat and Gibson to allow the district court to reexamine the acceptance of responsibility question on remand, as the distinct court already has denied such a reduction and its finding will control on remand.

To the extent that Haversat and Gibson have argued that the district court erred in finding that they did not accept responsibility, we find that the district court's decision was not clearly erroneous. Both Haversat and Gibson pleaded nolo contendere -- a plea which does not admit responsibility. Moreover, they have continued to minimize their role in the conspiracy throughout the proceedings, even on appeal.

VI.

Haversat and Gibson also argue that the district court erred in determining the volume of commerce involved in this case, *see* U.S.S.G. § 2R1.1(b)(2), and in adding a two-level increase in offense level based on that erroneous computation. They contend that the presentence investigative report improperly calculated volume of commerce to be in excess of $20,000,000 by including over $5,000,000 in sales that were delivered after the conspiracy reached full bloom in April of 1987. They contend that the district court erroneously adopted the miscalculation. They argue that the amount of commerce involved was no more than $14,336,429, just below the $15,000,000 break point where the second level is added for volume of commerce under U.S.S.G. § 2R1.1(b)(2)(D) (1987).

We review the district court's factual findings at sentencing for clear error. 18 U.S.C. § 3742(e). We will reverse only if we are "'left with the definite and firm conviction that a mistake has been committed.'" *United States v. Lawrences*, 915 F.2d 402, 408 (8th Cir. 1990) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985)). We have reviewed the evidence and find no clear error in the district court's determination of the volume of commerce involved. The defendant's expert essentially testified that *all* pre-April 1987 sales must be excluded from the government's computation of volume of commerce. The record is clear, however, that the conspiracy was underway in May of 1986 when the new price books were introduced and that significant sales were made between May of 1986 and April of 1987 under the pricing scheme of the conspiracy. Hence, we do not find the district court committed clear error by failing to be persuaded by the defendants' expert. Accordingly, we affirm the district court's finding on the volume of commerce in this case, and that finding will control at resentencing.

VII.

For the reasons stated above, we affirm the district court's findings on acceptance of responsibility and volume of commerce affected by the price-fixing conspiracy but reverse the sentences imposed and remand for resentencing.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 94-3719

United States of America,	*	
	*	
Appellee,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	Eastern District of Missouri.
	*	[UNPUBLISHED]
Robert A. Haversat,	*	
	*	
Appellant.	*	

Submitted: April 17, 1995

Filed: May 2, 1995

Before BOWMAN, Circuit Judge, JOHN R. GIBSON, Senior Circuit Judge, and HANSEN, Circuit Judge.

PER CURIAM.

Robert A. Haversat appeals the sentence imposed by the district court[8] following remand from this court. We affirm.

Haversat pleaded nolo contendere to a single count of conspiring to fix prices in violation of section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. The district court departed downward at sentencing and sentenced Haversat to pay a $250,000 fine, but found a reduction for acceptance of responsibility to be inappropriate. On appeal, we reversed the downward departure, finding no basis justifying departure, and affirmed the denial of an acceptance-of-responsibility reduction. United States v. Haversat, 22 F.3d 790 (8th Cir. 1994).

At resentencing, the district court refused to reconsider the issue of acceptance of responsibility, relying on our denial of Haversat's request in his first appeal that the district court be allowed to reexamine the question on remand. The court sentenced Haversat to 4 months imprisonment and 12 months supervised release (with 4 months to be served in home detention).

Haversat now challenges the district court's refusal to reopen this issue. Normally, the law-of-the-case doctrine bars the district court from revisiting the acceptance of responsibility question on remand "unless defendant[] produced substantially different evidence or demonstrated that the prior decision was clearly erroneous and involved a manifest injustice." United States v. Rosnow, 9 F.3d 728, 730 (8th Cir. 1993), cert. denied, 115 S. Ct. 120 (1994). Here, however, the bar to the district court revisiting the acceptance issue was even higher because in the first appeal

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[8] The Honorable Clyde S. Cahill, Senior United States District Court Judge for the Eastern District of Missouri.

we denied Haversat's express request to allow the district court to reopen the case on remand and we thus instructed the district court not to reopen the issue.

We conclude that the district court committed no error in following our instruction not to reopen the acceptance-of-responsibility issue on remand. Moreover, even if the district court had not found that our instructions in the first appeal completely foreclosed reopening the issue on remand, the law-of-the-case bar clearly did. Haversat's alleged "substantially different" evidence at resentencing is, in reality, more of the same type and nature as he originally presented and it is only marginally different if different at all. It is not different in substance. Nor is it "new" -- most (if not all of it) was known to Haversat at the time of the original sentencing. Likewise, Haversat has not shown that the original denial of acceptance of responsibility was clearly erroneous or involved a manifest injustice. As we pointed out in the first appeal, Haversat pleaded nolo contendere to the charge against him -- a plea which does not admit responsibility and he continually minimalized his role in the antitrust conspiracy throughout the proceedings. He did not deserve a second bite at the acceptance of responsibility apple.

Accordingly, the judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 94-3719EMSL

United States of America,	*	
	*	
Appellee,	*	
vs.	*	Appeal from the United States
	*	District Court for the
ROBERT A. HAVERSAT,	*	Eastern District of Missouri
	*	
Appellant.	*	

The motion of appellant for an extension of time until May 30, 1995, to file a petition for rehearing with suggestion for rehearing en banc is granted.

May 8, 1995

Order entered Under Rule 27B(a):

Clerk, U.S. Court of Appeals, Eight Circuit

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Eighth Circuit
U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Michael E. Gans
Clerk of Court

TELEPHONE
(314) 539-3600

June 6, 1995

Ms. Marion Jetton
U.S. DEPARTMENT OF JUSTICE
Appellate Section
Room 3224
Tenth & Pennsylvania Avenue, N.W.
Washington, DC 20530

Re: 94-3719EMSL USA vs. Robert Haversat

Dear Counsel:

A petition for rehearing with suggestions for rehearing en banc has been filed by the appellant in the above case. I have been instructed by the court to request you to respond to the petition.

Please submit 21 copies of your response, limited to ten pages, by June 16, 1995. If you have any questions concerning the court's request, please contact this office.

Sincerely,

Michael E. Gans
Clerk of the Court

mls

cc: Robert W. Wilder
Barry A. Short
Paul R. Grand

District Court/Agency Case Number(s): 90-92-CR(4)

APPENDIX E

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

No. 94-3719EMSL

United States of America, *
*
Appellee, *
* Order Denying Petition for
vs. * Rehearing and Suggestion
* for Rehearing En Banc
Robert A. Haversat, *
*
Appellant. *

The suggestion for rehearing en banc is denied. Judge Beam would grant the suggestion for rehearing en banc. The petition for rehearing by the panel is also denied.

July 6, 1995.

Order Entered at the Direction of the Court

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX F

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C.

994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide to any victims of the offense.

(b) Application of guidelines in imposing a sentence.--The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(c) Statement of reasons for imposing a sentence.--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds

24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

If the court does not order restitution, or orders only partical restitution, the court shall include in the statement the reason therefor. The clerk of the court shall provide a transcription of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.--Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the

court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1989, and amended Pub.L. 99-570, Title I, § 1007(b), Oct. 27, 1986, 100 Stat. 3707-7; Pub.L. 99-646, §§ 8(a), 9(a), 80(a), 81(a), Nov. 10, 1986, 100 Stat. 3593, 3619; Pub.L. 100-182, §§ 3, 16(a), (17), Dec. 7, 1987, 101 Stat. 1266, 1269, 1270.)

APPENDIX G

§3E1.1. Acceptance of Responsibility

(a) If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by 2 levels.

(b) A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the court or jury or the practical certainty of conviction at trial.

(c) A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right.

Commentary

Application Notes:

1. In determining whether a defendant qualifies for this provision, appropriate considerations include, but are not limited to, the following:

(a) voluntary termination or withdrawal from criminal conduct or associations;

(b) voluntary payment of restitution prior to adjudication of guilt;

(c) voluntary and truthful admission to authorities of involvement in the offense and related conduct;

(d) voluntary surrender to authorities promptly after commission of the offense;

(e) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;

(f) voluntary resignation from the office or position held during the commission of the offense; and

(g) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

2. Conviction by trial does not preclude a defendant from consideration under this section. A defendant may manifest sincere contrition even if he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct).

3. A guilty plea may provide some evidence of the defendant's acceptance of responsibility. However, it does not, by itself, entitle a defendant to a reduced sentence under this section.

4. An adjustment under this section is not warranted where a defendant perjures himself, suborns perjury, or otherwise obstructs the trial or the administration of justice (see §3C1.1), regardless of other factors.

5. The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review and should not be disturbed unless it is without foundation.

Background: The reduction of offense level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates a recognition and affirmative acceptance of personal responsibility for the offense by taking, in a timely fashion, one or more of the actions listed above (or some equivalent action) is appropriately given a lesser sentence than a defendant who has not demonstrated sincere remorse.

The availability of a reduction under §3E1.1 is not controlled by whether the conviction was by trial or plea of guilty. Although a guilty plea may show some evidence of acceptance of responsibility, it does not automatically entitle the defendant to a sentencing adjustment.

APPENDIX H

§5K1.1. **Substantial Assistance to Authorities (Policy Statement)**

Upon motion of the government stating that the defendant has made a good faith effort to provide substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following conduct:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

Commentary

Application Notes:

1. Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.

2. The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant's affirmative recognition of responsibility for his own conduct.

3. Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain.

Background: A defendant's assistance to authorities in the investigation of criminal activities has been recognized in practice and by statute as a mitigating sentencing factor. The nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis. Latitude is, therefore, afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above. The sentencing judge must, however, state the reasons for reducing a sentence under this section. 18 U.S.C. § 3553(c). The court may elect to provide its reasons to the defendant in camera and in writing under seal for the safety of the defendant or to avoid disclosure of an ongoing investigation.

APPENDIX I

§5K2.0. Grounds for Departure (Policy Statement)

Under 18 U.S.C. §3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing. Nonetheless, the present section seeks to aid the court by identifying some of the factors that the Commission has not been able to fully take into account in formulating precise guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing judge. Similarly, the court may depart from the guidelines, even though the reason for departure is listed elsewhere in the guidelines (e.g., as an adjustment or specific offense characteristic), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Where the applicable guidelines, specific offense characteristics, and adjustments do take into consideration a factor listed in this part, departure from the guideline is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense of conviction. Thus, disruption of a governmental function, §5K2.7, would have to be quite serious to warrant departure from the guidelines when the offense of conviction is bribery or obstruction of justice. When the offense of conviction is theft, however, and when the theft caused disruption of a governmental function, departure from the applicable guideline more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the offense of conviction is robbery because the robbery guideline includes a specific sentence adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.

Harms identified as a possible basis for departure from the guidelines should be taken into account only when they are relevant to the offense of conviction, within the limitations set forth in §1B1.3.2